IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 24,152

RICHARD CASE NAGELL,

Appellant,

VERSUS

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

BRIEF OF APPELLEE

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SUBJECT: RICHARD CASE NAGELL, aka.

Enc. 2

No. 24152

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RICHARD CASE NAGELL,

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Appeal from the United States District Court for the Western District of Texas

El Paso Division

APPELLANT'S OPENING BRIEF

[redacted]

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases: Page

Cases	Page

IN THE UNITED STATES COURT OF APPEALS FOR THE

FIFTH CIRCUIT

RICHARD CASE NAGELL, Appellant	
vs.	No. 24152
UNITED STATES OF AMERICA, Appellee	APPELLANT'S OPENING BRIEF

STATEMENT AND NATURE OF THE CASE

Appellant was previously convicted on May 6, 1964 under a two count indictment; in the first count, for having on the 20th day of September, 1963 entered a Federal Insured Depository, with intent to commit therein a robbery; and, in the second count, with attempting to rob the same depository on the same occasion. He was sentenced to a maximum sentence of 10 years under 18 USCA Sec. 4208 a (2). This Court reversed appellant's first conviction and ordered a new trial. The opinion is reported at 354 Fed (2) 441.

At his subsequent trial, which commenced on September 19, 1966 and ended on September 27, 1966, the jury found him guilty under the first count of the indictment, the second count having been dismissed by the Court prior to submission of the case to the jury. Pursuant to such verdict, the court again sentenced appellant to a maximum sentence of ten years pursuant to 18 USCA Sec. 4208 a (2). Timely motions for (a) new trial; (b) re-urging appellant's motions for judgment of acquittal made during trial, and (c) for acquittal notwithstanding the verdict, were all denied. This appeal in forma pauperis followed. Appellant is still confined at the Federal Penitentiary at Leavenworth, Kansas.

SPECIFICATIONS OF ERROR

FIRST SPECIFICATION OF ERROR: The trial court erred in his instructions to the jury in the following particulars: (a) On the requisite (specific) intent and failure to charge affirmatively on the lack of such intent; (b) On instructing the jury that they could convict the defendant if he entered the bank with intent to commit " any felony " without limiting such to the felony charged in the indictment, and in overruling appellant's objection to such charge; and (c) In refusing, over defendant's objection, to instruct the jury on the defense of lack of mental capacity by defendant to formulate the necessary specific intent to commit the crime charged; and (d) On the defense of insanity.

SECOND SPECIFICATION OF ERROR: In the circumstances that it was given, the trial court erred in (1) its supplemental instructions urging the jury to arrive at a verdict by virtue of the so-called " Allen Charge " or a version of such charge, and (2) under the totality of the circumstances, the verdict was a product of judicial coercion.

THIRD SPECIFICATION OF ERROR: The evidence was insufficient as a matter of law to exclude beyond a reasonable doubt the hypothesis of insanity, and the trial court erred in denying appellant's timely motions for judgment of acquittal made during and after the trial.

FOURTH SPECIFICATION OF ERROR. The Court erred in refusing to admit into evidence, the government's motion for a psychiatric examination (defendant's Exhibit L) which was admissable to rebutt and impeach the government's contention at the trial, that the defendant was merely suffering from a

" jail psychosis " : shortly after his arrest, and therefore, that he was not suffering from any serious mental disease at the time of the offense.

FIFTH SPECIFICATION OF ERROR: The trial court erred in not charging the jury as requested by the defendant when the jury inquired (a) if under the court's charge mental illness was grounds for the defendant to be pronounced not guilty , and (2) requested an explanation in more detail and to give examples of " doubt " and " reasonable doubt " .

ARGUMENT AND AUTHORITIES UNDER THE FIRST SPECIFICATION OF ERROR.

(a) The trial court erred in his charge to the jury on the requisite (specific) intent, the overall effect of which placed a burden upon appellant to produce evidence to overcome a presumption of guilt, and the Court erred by failing to charge in an affirmative manner, the appellant's defense of lack of such particular intent. The first and only count of the indictment submitted to the jury " entering a federal depository with intent to rob, in violation of Title 18 USCA Sec. 2113 (a) " required a specific intent. MORISETTE v. U. S. 342 U. S. 246, 96 L. Ed 288, 72 S. Ct. 240; SCREWS v. U. S. 325 U. S. 91-96, 89 L. Ed 1495; PRINCE v. U. S. 352 U. S. 322, 1 L. Ed (2) 370 at 374, 77 S. Ct. 403; HEIDEMAN v. U. S. 259 Fed (2) 943 at 946 (D. C. Cir 1958) and WOMACK v. U. S. 336 Fed (2) 959 (D. C. Cir 1964). Although the trial court did recognize that " specific intent " was an essential element of the offense and a vital issue in the case, the Court improperly charged on such requisite intent. TCP 486-488, 493. At the outset, it will be noted that the Court failed to distinguish between a general intent and a specific intent; then he actually charged on both " general intent " and " specific intent " and in a contradictory manner. The trial court refused appellant's requested instruction on intent and to submit the case only on " specific intent " .

(see TCP 427,431) and overruled appellant's objections to the charge as given on intent (TCP 498,499). It is submitted that the charge in this case, if not more prejudicial is identical to the one condemned by this Court in MANN v. U. S. 319 Fed (2) 404. The case of ESTES v. TEXAS, 335 Fed (2) 609 by this circuit, is inapposite to this case because the language used in this case and in MANN was not used in ESTES. In U. S. v ROMANO 15 L. Ed (2) 210, 86 S. Ct. 279, 382 U.S. 136, where the offense charged was illegal possession of an unregistered still, the Supreme Court in striking down as unconstitutional the statutory inference of guilt by a defendant's unexplained presence at the side of the still, said at p. 212 of 15 L. Ed (2) :

> " If we were reviewing only the sufficiency of the evidence to support the verdict on count one, that conviction would be sustained. There was, as the Court of appeals recognized, ample evidence in addition to presence at the still, to support the charge of possession of an illegal still. But here, in addition to a standard instruction on reasonable doubt, the jury was told that the defendant's presence at the still, shall be deemed sufficient evidence to authorize conviction. This latter instruction may have been given considerable weight by the jury. The jury may have disbelieved or disregarded the other evidence of possession and convicted these defendants on the evidence of presence alone. "

So, in effect, even if apart from a statutory inference of guilt from accused's presence at the site of an unregistered still, there was sufficient evidence to support his conviction of illegal possession, custody and control of the still, yet the conviction was reversed, for the trial court, in instructing the jury, read the statutory inference and this statutory inference is unconstitutional. The error in this case, by the Court improperly shifting the burden on the requisite intent is therefore more palpable, inasmuch as the evidence and the totality of the circumstances made the requisite intent very much in issue and therefore the Court's charge was fundamental error. The instant case can equate with what the Supreme Court said in MORISETTE, supra, at 342 U.S. p. 275:" We think presumed intent had no place in this case " . In MANN v. U. S., supra, by this Court,

where the trial court charged both upon presumed intent and specific intent, the Court said:

> " Even though the trial judge did give an accurate charge on the necessity of intent and the burden of proof, we hold that to leave the jury with that part of the charge complained of in this case, was not cured by what was said elsewhere in the charge. Instructions to the jury must be consistent and not misleading. The fact that one instruction is correct does not cure the error in giving another inconsistent one. "

In PEREZ v. U. S. 297 Fed (2) 12 at p. 16, Judge Hutcheson said:

> " It is fundamental to our jurisprudence that instructions to the jury must be consistent with each other and not misleading to the jurors. Cf. Smith v. U. S. 230 Fed (2) 935 by the 6th Cir. 1956. ' The fact that one instruction is correct does not cure the error in giving another that is inconsistent with it.' Smith v. U.S. supra. Most important, in no condition of proof is it permissible to leave the jury with the idea that it has become the duty of the defendant to establish his innocence to obtain an acquittal. "

See also WARDLAW v. U. S. 203 Fed (2) 884 by the 5th Circuit. It is respectfully submitted that by virtue of the Court's instructions complained of herein, the burden of proof was shifted from the prosecution to the defendant to prove lack of intent, and left the jury with the idea that it had become the duty of the defendant to establish his innocence to obtain an acquittal. This impression was accentuated and the error of the court compounded by the Court's failure to give an affirmative defensive charge on lack of intent. TCP 499.

(b) The trial court committed error in instructing the jury the effect of which the jury could convict the defendant, if he entered the bank to " commit any felony" without limiting such to the felony charged in the indictment and overruling the appellant's objections to such charge. AT TCP 483, 484 the Court told the jury that one of the essential elements of the offense charged with reference to the first count, was " that on or about the date charged in the indictment, the defendant entered or attempted to enter any bank.... with intent to commit in such bank.... any felony affecting such bank... in violation of any statute of the United States, or any larceny..." . At TCP 496 — 498, appellant objected to such charge and pointed out the Court's error, specifically objecting to the Court's charge

that the same was misleading, and a pointing out that that was not the law governing the case, and that the government was bound by the felony specifically charged in the indictment and no other, and if the charge was left uncorrected, the jury would be left to speculate as to what felonies or what statutes were involved affecting such bank, and in violation of any statute of the United States, or any larceny. It is submitted that the Court's charge did not clearly and consistently and specifically apply the law to the facts; instead, the Court's instructions as submitted in this regard were not clear and were inconsistent with each other and were misleading to the jurors. The fact that one instruction is correct does not cure the error in giving another that is inconsistent with it. THOMAS v. U. S. 151 Fed (2) 183; SMITH v. U. S. 230 Fed (2) 935 (6th Cir. 1956) PEREZ v. U. S. 297 Fed (2) 12 (5th Cir. 1961) WILLIAMS v. U. S. 131 Fed (2) 21 at 23 (D.C.Cir 1942). A federal court has a duty to properly explain the law of the case to the jury. U. S. v THOMAS, supra. Further instructions may correct a possible error previously made. BLAND v. U. S. 299 Fed (2) 105 (5th Cir. 1962) . Besides violating these principles pertaining to instructions, the Court's charge on these particulars amounted to error of constitutional proportions because a defendant in a criminal case is entitled to know what he is charged with; and is entitled to be tried on the charge brought against him. Any material variance from indictment charged,by proof, or submission of criminal case for consideration by jury, if found prejudicial, is reversable error. A federal court cannot permit a defendant to be tried on charges that are not made in the indictment against him. A charge in an indictment cannot be broadened, whether by change in wording of the indictment, a bill of particulars, or an instruction to the jury. A defendant is entitled to be tried on the specific acts alleged in the indictment. STIRONE v. U. S. 361 U.S. 212, 4 L. Ed (2) 252, 80 S. Ct. 270 (1960) THOMAS v. U.S., supra WOOD v. U. S. 342 Fed (2) 708 (8th Cir. 1965) DE MAYO v. U. S. 232 Fed (2) 472

(8th Cir, 1929) BISHOP v. U. S. 16 Fed (2) 406 (8th Cir. 1926) EPSTEIN v. U. S. 174 Fed (2) 754 (6th Cir. 1949) . The United States Court of Appeals for the 8th Circuit has ruled that instructions given to a jury in a criminal case should not include or comment be made on that part of a statute defining an offense which is not charged in an indictment. See DE MAYO v U. S., supra; BISHOP v. U. S., supra , and WOOD v. U.S, supra. In the instant case, the trial court not only did that, but went outside the facts alleged in the indictment and quoted the statute verbatim as an essential element of the crime for which the appellant was then on trial, and although appellant timely requested a correction to correct the vice in such instruction, the Court denied same and overruled the appellant's objection to the charge as given. The claimed error in the instant case is somewhat similar to the claimed error in THOMAS v. U. S., supra, where the Court had erroneously catagorically instructed the jury that defendant was charged with a violation of the espionage act, where defendant was indicted for conspiracy alone to violate the espionage act. The Court at p. 187 of the THOMAS case, said:

> " The confusing nature of this exerpt did not serve to clarify the errneous instructions theretofore given or in anywise to retract them; nor do we think that a subsequent statement of the Court, ' of course you all have in mind the charge here is conspiracy ' was a sufficient correction. The vice of the contradictory instructions was that they not only tended to confuse the jury as to the actual basis of the indictment, but to leave the wholly erroneous impression that Thomas was indicted for two offenses rather than for one. "

The vice in the Thomas case was not as great as in this case, for in the instant case the jury was left to speculate in a much broader field " of any felony affecting such bank and in violation of any statute of the United States, and any larceny " and please note in the instant case that the error was aggravated more so because the jury was told this as constituting one of the essential elements of the offense for which the defendant was then on trial. Intent being a vital issue in the case, appellant requested an affirmative defensive charge on the lack of the requisite intent (TCP 427, 431-432) and objected to the

Court's charge as given since it failed to charge as requested. (TCP 499) It is elementary that a defendant in a criminal case is entitled to have instructions relating to a theory of defense for which there is any foundation in the evidence and whether or not consistent with the defense trial theory. WOMACK v. U. S. 336 Fed (2) 959 (DC Cir 1964); TATUM v. U. S. 190 Fed (2) 612 (D.C.Cir. 1951). A charge is erroneous which ignores a claimed defense with such a foundation. HYDE v. U. S. 15 Fed (2) 816 (4th Cir. 1926) The charge to which he is entitled upon proper request in such circumstances is one which precisely and specifically, rather than merely, generally or abstractly, points to his theory of defense. U. S. v. INDIAN TRAILER CORP. 226 Fed (2) 595; APPELL v. U. S. 247 Fed (2) 277 (8th Cir. 1961) and one which does not unduly emphasize the theory of the prosecution, thereby de-emphasizing proportionately the defendant's theory. See PEREZ v. U. S., supra. The refusal of the trial judge to instruct the jury as requested was a violation of these principles. Any of these errors in the Court's instructions, (1) improperly shifting the burden to appellant by charging on presumptive intent; (2) failing to charge affirmatively on the defense of lack of the requisite intent; and (3) not limiting his charge to particular acts alleged in the indictment, were not of the type to be considered as harmless errors, but were errors of constitutional proportions which affected the substantial and fundamental rights of the appellant, afortiori, when considered collectively.

(c) The trial court erred in failing and refusing to charge the jury over the appellant's objections, on the defense of lack of mental capacity by the appellant to form the requisite (specific) intent required to commit the crime charged; notwithstanding that there was evidence in the record fairly raising such defense. See defendant's requested charge (TCP 432) and see the defendant's objections to the Court's charge in this respect (TCP 499). To the effect that appellant was entitled to such affirmative defense, see ALLEN v. U. S. 239 Fed (2) 172, at 173, by the 6th Circuit, where the

Court stated:

> " Where a specific intent is essential to the crime charged, as in this case, and evidence is introduced that might create a reasonable doubt, whether the appellant was sober enough or sufficiently in possession of his faculties to be capable of forming such intent, the jury must be instructed to acquit if they have such a doubt. Cf. Edwards v. U.S. 84 U.S. App.Dec.310, 172 Fed (2) 884. Accordingly the above mentioned instruction of the Court was erroneous. It is to be added that after the brief on behalf of the appellant was filed, the government confessed error. It seems plausible, on the record, that appellant was innocent of any criminal intent " .

In RHODES v. U. S. 282 Fed (2) 59 (4th Cir. 1960) at p. 60, the Court said:

> " While it is true that the defense of insanity was not advanced, it was still open to the defendant to introduce psychiatric testimony to show that by reason of his mental condition he was unable to form the requisite intent or mens rea which is an essential element of the crime charged. An intent beyond the mere doing of the act is not invariably required where, however, it is inherent in the offense or the statute creating it prescribes as part of the definition that a specific state of mind shall accompany the act, as this statute does , a full exposition of the pertinent evidence is permitted if properly tendered. "

Long ago this was treated as established doctrine in HOPT v. PEOPLE OF UTAH, 104 U. S. 873,where it was held appropriate to show the absence of a requisite mental state, whether due to drunkness or otherwise. Psychiatric testimony, if it has bearing upon this issue, has a rightful place in the record. The American Law Institute Model Penal Code formulates the rule as follows: " Evidence that the defendant suffered from a mental disease or defect shall be admissible whenever it is relevant to prove that the defendant did or did not have a state of mind which is an element of the offense " . Section 4.02 (1) Tentative Draft No. 4 (1955). See also WOMACK v. U.S., supra; WHEATLEY v. U. S. 159 Fed (2) 599 (4th Cir 1946) ; EDWARDS v. U. S. 172 Fed (2) 884 (D. C. Cir 1949). The Supreme Court of the United States in HOPT v. PEOPLE OF UTAH, supra, did not limit its holding to intoxication affecting the mental process to the extent of rendering a person incapable of formulating a specific intent, but to other

reasons which might affect the mental condition of a person. It is submitted that the evidence in this case clearly raises such issue. Therefore, even though the jury may have found him sane within the Court's charge pertaining to insanity, they could have nevertheless acquitted him properly under the evidence and under this theory and with a proper instruction in this regard.

> " ..... the defendant is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent or of doubtful credibility. " TATUM v. U. S. 190 Federal (2) 612 , 88 U.S. App. D. C. 386. See also MOORE v. U.S. 356 Fed (2) 39 at pp. 42,43.

(d) The trial court charged on the existing law on " tests or standards for insanity in this Circuit " , DAVIS v. U. S. 165 U.S. 373, CARTER v. U. S. 325 Fed (2) 697 (5th Cir. 1963) cert. den. 381 U.S. 927; HOWARD v. U. S. 232 Fed (2) 274 (5th Cir. 1956) also in 229 Fed (2) 602 by the 5th Cir., 1956. Appellant timely submitted a requested instruction embodying all of the federal circuits ' various present tests for insanity and requested the Court to charge the jury under such various " tests " for the determination of insanity and objected to the Court's failure to so charge. (TCP 427) 496 The government in this case, as well as in all other cases in which appellants have asked this Court to adopt a more modern test in conformance with the prevailing social standards and progress in the field of psychiatry, has opposed any change, mainly on the basis that each case was not a proper case to make such change " and that this court would do well to wait until a more appropriate case comes along " . See the government's reply brief in ROBERT EDWARD HAUSMANN v. UNITED STATES, No. 23522, not yet decided, pending in this court, at p. 6:

> " Appellant further urges that this Court should adopt a new test of legal insanity. Even if this Court is considering adopting such new test, it is urged that the present case is not an appropriate one for its application. Appellant's evidence of insanity

was weak and was contradicted by government evidence. Furthermore, appellant's evidence revealed basically a sociopathic personality. "

See also the government's opening brief in the case of HARRY EDISON HACKWORTH, No. 23598 not yet decided, at p. 18. This same contention was made by the government in the case of CARTER v. U. S., supra, and the solicitor general opposed the petition for writ of certiorari on more or less the same basis that the government opposes the adopting of new tests of insanity in this case; that is, that the time is not right, and that this is not an appropriate case and that the Courts should wait. Without belaboring this Court with a lengthy discussion, it is submitted that under the evidence and the totality of the circumstances, all of the reasons heretofore advanced by the government to stay and delay this Court from adopting a new test for insanity are not well taken, and if there was ever an appropriate case warranting this Court for adopting a new test of insanity, this is it. It is respectfully submitted that the test adopted by the 3rd Circuit in CURRENS v. U. S. 325 Fed (2) 20, or by the 10th Circuit in WION v. U. S. 325 Fed (2) 420 or the test adopted by the Modern Penal Code of the American Penal Institute and adopted by the 2nd Circuit in FREEMAN v. U. S. 357 Fed (2) 606 and U. S. v MALAFRONTE 357 Fed (2) 629 or even the test set out in DURHAM v. U. S. 237 Fed (2) 760 and McDONALD v. U. S. 312 Fed (2) 847 (D. C. Cir) would be proper and would conform to the evidence in this case and would conform to the present legal, social and medical standards adequately.

The trial court's instructions to the jury on insanity should have included the requested instructions wherein appellant requested the Court to charge the jury that the mere labeling by experts that appellant was merely suffering from a personality disorder and not a mental illness or defect, did not rule out or preclude a finding that appellant was suffering from a mental illness within the Court's main charge defining legal insanity. U. S. v. FREEMAN, supra, DURHAM v. U. S., supra; McDONALD v.

U. S., supra; CAMPBELL v. U. S. 307 Fed (2) 597 (D. C. Cir 1962) and BLOCKER v. U. S. 288 Fed (2) 853 at 859-862. The trial courts instructions should have also included the requested instructions asking that the jury be charged that " both acts resulting from sudden impulse as well as acts resulting from premeditation were applicable in determining whether the acts of the defendant on September 20, 1963 were the result of mental illness which had affected the governing power of his mind in refraining from doing wrong " . CARTER v. U. S., supra, and see TCP 376. See also defendant's objections to the Court's refusal to charge as requested on the various tests (TCP 496) and the Court's refusal to grant and charge the jury in reference to the matter of insanity; the two previous requests on the labeling by experts of personality disorder and also the failure to tell them that both acts resulting from sudden impulse as well as from premeditation were applicable in determining whether it affected the governing power of his mind.

ARGUMENT AND AUTHORITIES UNDER THE SECOND SPECIFICATION OF ERROR.

Under the circumstances of this case, the trial court should not have in any way urged the jury to arrive at a verdict under the so called " Allen Charge " or any version of such charge, since it coerced or improperly induced those members of the jury who were for acquittal and who no doubt were embattled and exhaused, to surrender or compromise their individual convictions. "The correctness of the Allen Charge must be determined by the consideration of the facts of each case and the exact words used by the trial judge " . POWELL v. U.S. 297 Fed (2) 754 (5th Cir. 1962)

The circumstances in connection with and which are related to this point are found in the record at TCP 500 to 527. In the first place this was a rather simple case as to the facts. There was no real issue as to what had actually transpired and the

case was submitted to the jury only under one count. The only real issues in this case, as submitted to the jury by the Court, were (1) whether or not the defendant had the requisite criminal intent in doing what he did, or (2) whether he was sane (within the court's charge) at the time of the act alleged in the indictment. The jury had deliberated approximately fifteen hours, during which period of time they had advised the Court twice, once at 9:00 o'clock P.M. on the 22nd day of September, 1966 that they were unable to reach a unanimous verdict, and the second time at 4:45 P.M. on the 23rd day of September, 1966, that they were deadlocked and could not come to a unanimous verdict. There transpired approximately five hours and forty-five minutes of actual deliberations in between the sending of the first note to the sending of the second note to the Court. Approximately ten to fifteen minutes before they recessed for the week-end (they recessed at 5:30 P.M. on Friday the 23rd) they received the Allen Charge. The jury resumed deliberations on Monday, September 26, 1966 at 9:00 o'clock A.M. and except for one hour for lunch, the jury deliberated until 3:05 P.M. at which time they returned to the Court with their verdict.

Counsel for appellant felt that the harm done by the Court's version of the Allen Charge in the insant case could not be rectified and accordingly objected and excepted and moved for a mistrial not once but twice. See TCP 522,523,525, 526 See BURRUP v. U. S. 371 Fed (2) 556 at 558 (10th Cir. 1967) where the Court said, citing from BERGER v. U. S. 62 Fed (2) 438

> " No objection was made to the Allen instruction, but since it affects the judge-jury relationship, and..... 'cannot be effectively remedied by modification of the judge's charge after the harm has been done' we will take note of it here " .

See BRADFIELD v. U. S. 272 U.S. 448, 47 S. Ct. 135, 71 L. Ed 345 and BURROUGHS v. U. S. 365 Fed (2) 431 (10th Cir). It is true that the Allen Charge, or versions thereof, have been approved as long as the jury is given to understand that they should

not compromise or surrender their convictions on the facts; however, these admonitions in the insant case were totally nullified and dissapated in the light of what actually happened and was done in this case, before and after the charge was given. See BURRUP v. U. S., supra, where the Court stated that the Allen charge is less likely to be coercive if given prior to the time the jury indicates difficulty in agreement. The giving of the charge in the insant case resulted in undue coercion because under the entire circumstances it completely obliterated the admonitions against the surrender of individual convictions. Furthermore, the charge as given by the Court in this case was error in that (a) it told the jury that the case should be disposed of, and (b) in addressing itself to the minority in such a manner as to imply judicial criticism of their position merely because they were in the minority, and (c) in telling the jury in no uncertain terms that it was their duty to arrive at a verdict, instead of telling them directly that it was their duty to retain their conscientious beliefs, despite the desirability of having a verdict. The Allen type charge given by the Court in this case, considering all the circumstances and all the remarks of the Court to the jury, entreated the jury to arrive at a verdict and left them with the impression that they were going to be held until they did arrive at a verdict. When considered as a whole, the Court's version of the Allen charge in this case failed to provide for adequate admonition against either coercion, compromise or surrender of individual convictions. See the case of POWELL v. U. S. 297 Fed (2) 318 (5th Cir) 1961 ; GREEN v. U. S. 309 Fed (2) 852; and ANDREWS v. U. S. 309 Fed (2) 127. Appellant's further position is that the Allen Charge, or any near version of it, should be abolished because in logic and reason it actually and truthfully causes a juror to surrender unwillingly his sincere and deliberately arrived at conviction of what the verdict should be and thus defeats the purpose of the constitutional requirement of a unanimous verdict in federal courts. See BURROUGHS v. U. S., supra. The Allen

charge should have no place in our criminal jurisprudence. " It has also been roundly criticized as an unwarranted invasion of the fact finding province of the jury " . See Judge Brown's dissent in HUFFMAN v. U. S. 297 Fed (2) 754 (5th Cir); Judge Wisdom's dissent in ANDREWS v. U. S. 309 Fed (2) 127 (5th Cir) and speaking for the court in GREENE v. U. S. 309 Fed (2) 852 and BURROUGHS v. U. S., supra.

Under the totality of the circumstances and the remarks of the Court, the verdict in this case was a product of judicial coercion since those jurors who were for acquittal no doubt were left with the impression and belief that unless they surrendered their conscientious views they would be held until they would arrive at a verdict. JENKINS v. U. S. 380 U.S. 445, 13 L. Ed (2) 957, 85 S. Ct. 1059; BOYETT v. U. S. 48 Fed (2) 482 (5th Cir 1931) KESLEY v. U. S. 47 Fed (2) 453 (5th Cir. 1931) U. S. v. DAVIS 115 Fed Supp 392at 401, reversed on other grounds 212 Fed (2) 681.

ARGUMENT AND AUTHORITIES UNDER THE THIRD SPECIFICATION OF ERROR.

This brief will not be extended by a detailed discussion of the evidence since of course, where the sufficiency of the evidence is raised, each case must be decided on its own particular facts.

It is appellant's contention that reasonable jurors could not conclude beyond a reasonable doubt that Richard Case Nagell, the appellant, was sane at the time of the alleged bank robbery, and that therefore, reasonable men on the basis of the evidence, must have necessarily possessed a reasonable doubt as to the defendant's sanity, and that reasonable men must have necessarily concluded that the government had failed to sustain its burden of proving beyond a reasonable doubt that the accused had the mental capacity to commit the crime charged. The nature and quantum of evidence which the prosecution must produce to sustain its burden to takethe issue of

sanity to the jury will vary in different cases, depending, of course, on the nature and quantum of evidence introduced by the defendant to show insanity. BROWN v. U. S. 351 Fed (2) 473 at 474 (5th Cir 1965). Therefore, in a given case, the government's evidence may be adequate when the defendant has introduced merely some evidence of insanity, but as in this case, may be altogether inadequate when the appellant introduced substantial evidence of legal insanity. WRIGHT v. U. S. 250 Fed (2) 4,7 (D.C.Cir) HARTFORD v. U. S. 362 Fed (2) 63 (9th Cir 1966) and U. S. v WESTERHAUSEN, 263 Fed (2) 844 (7th Cir).

It is appellant's contention that the entire record, bearing on the issue of insanity at the time the offense was committed in the insant case, raised no more than a reasonable doubt of sanity, and under the authority of the following cases, the trial court should have granted appellant's motion for judgment of acquittal or his motion for judgment of acquittal notwithstanding the verdict of the jury. U. S. v WESTERHAUSEN, supra DOUGLASS v U. S. 239 Fed (2) 52 (D. C. Cir) WOODRING v. U. S. 311 Fed (2) 417 (8th Cir) WRIGHT v. U. S., supra; McKENZIE v. U. S. 266 Fed (2) 524 (10th Cir) FITTS v. U. S. 284 Fed (2) 108 (10th Cir) ISAAC v. U. S. 284 Fed (2) 168 (D.C.Cir) U. S. v ROE 213 Fed Supp 444 (U.S.Ct. for West. Dist . of Mo.) FIELDING v. U. S. 251 Fed (2) 878 (D. C. Cir) ARGENT v. U. S. 325 Fed (2) 162 (5th Cir); the dissent in BRADLEY v. U. S. 249 Fed (2) 922 (D. C. Cir) LYNCH v. OVERHAUSLER 8 L. Ed (2) 211, 369 U. S. 705 and HOPKINS v. U. S. 275 Fed (2) 155 (D.C. Cir).

One of the essential elements in this case that the government was bound to prove beyond a reasonable doubt was that the defendant was legally sane at the time of the acts alleged in the indictment. The Supreme Court in WOODBY v. I N S, 17 L. Ed (2) 362 (1966), said:

" The elementary but crucial difference between burden of proof and scope of review is, of course, a commonplace in the law. The difference is most graphically illustrated in a criminal case. There the prosecution is generally required to prove the elements of the offense beyond a reasonable doubt. But if the correct burden of proof was imposed at the trial, judicial review is generally limited to ascertaining whether the evidence relied upon by the trier of facts was of sufficient quality and substantiality to support the rationality of the judgment. In other words, an appellate court in a criminal case ordinarily does not ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt, but whether the judgment is supported by substantial evidence. "

This court can determine for itself the adequacy of an expert's opinion on the question of sanity,/ This court can see from the Transcript of Court Proceedings in this case to either support or reverse a conviction. See MIMS, infra.

that [redacted] testimony (TCP 332-356) and [redacted] testimony (TCP 292-321) who were the witnesses relied upon by the government to show sanity, was not adequate and it was not supported by " underlying facts" and their opinions were merely conclusory, since they did not have " the whole picture and background " (TCP 361-365 and 371-372) of the defendant's mental illness,/ and their examination of the defendant was perfunctory. See ROLLERSON v. U. S. 343 Fed (2) 271 (D.C. Cir 1964) where Judge Bazelon, writing for the ., stated: b6 b7C

" Conclusions of psychiatrists that a man is not ' mentally diseased' may not be enough in any particular case, to meet the government's burden of proving sanity beyond a reasonable doubt. "

See also the opinion of Judge Sarah T. Huges in BUSH v. McCOLLUM 231 Fed Sup 560 at 563, affirmed by this Court in 344 Fed (2) 672. Another case supporting appellant's contention is U. S. v. WESTERHAUSEN, supra, where at p. 853, the Court said:

" Based upon our extended review of the record in this case, we must conclude that the evidence introduced by the government is not sufficient to sustain the conviction. It is our considered judgment, in the light of appellant's long and consistent history of insanity, that reasonable men must necessarily have possessed a reasonable doubt as to his sanity on the date of the robbery in 1952. The government has failed to sustain its burden of proving this essential element beyond a reasonable doubt. We hold that the district court erred in denying appellant's motion for

> acquittal. No good purpose could be served in ordering a new trial. 28 USCA Sec. 2106. Indeed, neither party has requested a new trial. "

The recent case of GEORGE LEE MIMS SR. v. U. S., No. 20626 decided by this Court on February 16, 1967 can clearly be distinguished from the insant case and supports appellant's contention that the verdict in this case is an " unreasonable verdict " , and appellant's motions for judgment of acquittal should have been granted. In MIMS the expert opinion evidence was weak as opposed to the history of mental illness in the instant case. The weaknesses noted in the expert opinion testimony in the MIMS case are not found in this instant case. It is respectfully submitted that what this Court said in MIMS when considering the cases cited by appellant for a judgment of acquittal, is applicable on the facts to this case:

> " The cases relied upon by appellant are distinguishable on several grounds. Insofar as the question here presented is concerned, each one of those cases holds no more than that upon particular facts in that case, the court concluded that the government has failed to discharge its burden of proving the sanity of the defendant beyond a reasonable doubt. None of them had the weaknesses in the expert opinion testimony this one has. Most of the defendants had undergone long periods of treatment in mental institutions , and the psychiatrists who had treated them during those times testified to their insanity. The opinions of the psychiatrists were substantially supported by objective symptoms. They presented an entirely different situation from the one in this case where there were jury questions both as to whether there was a doubt about the appellant's sanity, and, if so, whether the doubt was a reasonable one, and where reasonable inferences could be drawn that appellant was legally responsible for his acts. "

It is respectfully submitted that the evidence relied upon by the trier of facts was not of sufficient quality and substantiality to support the rationality of the judgment. In fact, the verdict of guilty under the evidence and the subsequent sentence in this case, is shocking.

ARGUMENT AND AUTHORITIES UNDER THE FOURTH SPECIFICATION OF ERROR.

The government sought to weaken and minimize the defendant's mental illness and claim of insanity on the very date of the alleged offense by showing and stressing to the jury that the experts upon which appellant so heavily relied to establish such defense, had not had an opportunity to see and examine him on such date or shortly thereafter, but had examined him much later from the crucial date and that his irrational behavior, shortly after his arrest and encarceration in the county jail was not the product of a mental disease or major illness, but merely a " jail psychosis " brought about by his arrest and confinement. See TCP 158-159, 329-330 and 390. In order to meet such contention of the government, the appellant sought to introduce as evidence, the motion filed by the government pursuant to 18 USCA Sec. 4244, requesting that the appellant be examined to determine his competency to stand trial which was filed just four days after his arrest (the pertinent parts of the motion are set out in the footnote below) *. The appellant offered such motion in evidence (Exhibit L, TCP 402, 402) but the Court refused to admit it, saying that it was not admissable for any purpose, and that

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* Filed September 24, 1963, Commissioner's No. 25889.... There being reasonable cause to believe that said defendant may be presently insane or otherwise so mentally incompetent as to be unable to assist in his own defense and as grounds for such belief would respectfully show unto the Court the following:

1. Records of the Veterans Administration Hospital, Bay Pines, Florida, show defendant admitted to said hospital on December 20, 1962 and released January 20, 1963 with diagnosis of " chronic brain syndrome associated with brain trauma with behavorial reaction characterized by passive-agressive and paranoid features " . b7D

2. [redacted]

3. Since his arrest on September 20, 1963 defendant has stated the belief that he has been and is now in need of psychiatric services.

4. The regular jail physicians employed by the United States Marshal for the case and treatment of federal prisoners has stated that defendant should be examined by a psychiatrist due to unusual behavior on the part of defendant seen by and related to him.

* Wherefore,... United States prays the Court to appoint a qualified psychiatrist of this city to examine defendant as to his mental condition, who should report to this court and to commit the defendant to the Correctional Institution at La Tuna, Texas if determined by the psychiatrist to be necessary to conduct such examination for such period of time as the Court deems proper.

Ernest Morgan b6
by [redacted] Asst. U.S.Atty. b7C

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if the finding was not admissable, neither was the government's motion. Appellant explained to the Court that he did not seek to introduce any order or finding but that it was admissable to rebut the government's contention. Defendant duly excepted to the Court's action. TCP403. Certainly by the very contents of the motion, it would have shown to the jury a totally different and inconsistent contention of the government on September 24, 1963 from the one it was taking on the day of the trial and certainly would not only have had the effect of impeaching and rebutting the government, but would have sustained and corroborated and bolstered appellant's contention that he was suffering from a major mental illness on that day.

Title 18 USCA Sec. 4244 prohibits two things at the trial of an accused: (1) statements made by him during the course of an examination, and (2) a finding by the Court that the accused was competent to stand trial. Contrary to the trial court's reasoning for the exclusion of Exhibit L, appellant contends that both of these prohibitions are not absolute prohibitions and are for the benefit of the defendant, and he may, if he chooses, waive these prohibitions if it is necessary and proper for his defense strategy. See BAILEY v. U. S. 248 Fed (2) 558 (D. C. Cir 1957), cert. den. 78 S.Ct. 351, 355 U.S. 919 , 2 L. Ed (2) 79. By the Court's action in limiting his evidence, the appellant was not adequately permitted to meet the government's contention.

The appellant should have been allowed to at least introduce the motion, when appellant's counsel advised the Court that he did not intend to introduce any finding or order, since under the circumstances, it was relevant to sustain appellant's contention and relevant for purposes of impeachment and rebuttal of the government's contention. LYLES v. U. S. 254 Fed (2) 725 at 732 (D. C. Cir 1957) cert. den. 356 U.S. 961, 78 S. Ct. 997, 2 L. Ed (2) 1067; NAPLES v. U. S. 344 Fed (2) 508 at 516 (D. C. Cir 1964). If a finding of competency may be admissable either because a defendant waived the prohibition by " opening the door for it " or by expressly waiving such prohibition by offering it in evidence, and as a part of his strategy defense, then surely the government's pretrial motion , inconsistent with its trial theory, should have been admitted. The trial court could have then, on its own or by request of the government, given the jury a cautionary instruction and told them that the

motion of the government was introduced for the sole purpose of impeachment or rebuttal of the government's position and for no other purpose. TARIN v. U. S. 353 Fed (2) 71 (5th Cir. 1965) The permissable limits of the evidentiary rules of impeachment are very broad and under the doctrine in WALDER v. U. S. 347 U.S. 62, 74 S. Ct. 354, 98 L. Ed 503, and U. S. v CURRY 358 Fed (2) 904 at 910 (2nd Cir 1965), the Court erred in refusing to admit in evidence, appellant Exhibit L and certainly under the totality of the circumstances, with the matter of insanity being so highly opposed by the government, the Court's action was not harmless error.

ARGUMENT AND AUTHORITIES UNDER THE FIFTH SPECIFICATION OF ERROR.

On the second day of deliberations, the jury submitted to the Court the following request: " Your Honor, in order to clarify your charge to the jury, is it possible for you to tell us if under your charge, is mental illness grounds for the defendant to be pronounced not guilty ? Also, please explain in more detail and give examples of doubt and reasonable doubt " . See TCP 505. It should be noted that the first question related specifically to the charge and not to the evidence. No inquiry was made as to whether under the evidence the appellant could be pronounced not guilty. The jury was merely seeking a supplementary clarification or explanation of the original charge as given. The Court did not give a specific answer to a specific question as suggested and requested by counsel (TCP 506, 507, 508) , " Yes, mental illness is a ground for this defendant to be pronounced not guilty and a definition of mental illness is in this charge " or, he could have charged, " You can, and a definition of mental illness which would justify your acquitting him is in this charge " , or words to that effect. No such requested instruction or a charge substantially as was requested, was given by the Court. Instead the Court abstractly answered such questions by re-reading

the charge on insanity and stressed the definition of the term " insanity " and asked the jury to re-examine the evidence and their conclusions based on the evidence and to determine for themselves whether appellant fit within such definitions. TCP 511 . The jury wanted a " Yes " or " No " answer in order to be properly guided, and the Court never gave them such an answer. By the trial court's hedging in answering such inquiries and by failing to properly and specifically instruct the jury, the appellant probably suffered prejudice since the jury was left with the impression that they could or should not " pronounce him not guilty " under the Court's charge. This theory is not too speculative because they never received the answer to their question. In WRIGHT v. U. S. 250 Fed (2) 4 (D.C.Cir 1957) at pp. 11 and 12, it was held error for the court to refuse to give the requested instructions and to amplify and clarify his instructions, and to answer specifically the jury's questions regarding whether in determining sanity, " any other kinds...might be included...than dementia or schizophrenia " . The Court in the instant case further erred in refusing to give the requested instruction of appellant's counsel in connection with a further clarification of the terms " doubt " and " reasonable doubt " . The appellant mistakenly cited Duskey v. U. S. instead of Lynch v. Overhausler, but appellant's counsel did properly phrase his requested instruction as in OVERHAUSLER and therefore the Court failed to directly and accurately apply the principle of reasonable doubt to the defense of insanity as requested by the appellant's counsel at TCP 515. Therefore, both inquiries of the jury were not properly answered by the Court. Where a jury, desiring additional instructions, makes explicit its difficulties, a trial judge should clear them away with concrete accuracy, and a failure to do so is error affecting the substantial rights of a defendant. BOLLENBACH v. U. S. 66 S. Ct. 402, 326 U.S. 607, 90 L. Ed 358.

CONCLUSION

For a guilty person to escape punishment is not justice; but to convict a person such as appellant and to label him a criminal, even though he is so mentally ill because of organic brain abnormality that he is in reality incapable of commiting a crime is in this day and in this country, a miscarriage of justice. The appellant has been continously confined since the date of his arrest on September 20, 1963 to the date of the filing of this his opening brief. He has undergone two trials and one reversal, seeking to establish his innocence. It is respectfully submitted that a person such as appellant is in reality an innocent person, not merely a person who has not been proven guilty . Under the totality of the circumstances, and should this Court reverse this conviction, it would be cruel and inhuman punishment and a denial of due process of law, and no good purpose could be served to remand and to order a new trial. A proper and just disposition of this case, in the event of reversal based on any of the several errors claimed by appellant's counsel (and upon any other possible or fundamental erros which this Court may discover are contained in this record, and which counsel for appellant may have overlooked) considered either separately or collectively and in the light of the background and the record in this case, would be to reverse, vacate and set aside the conviction of appellant, and to enter an order granting appellant's motion for acquittal, or to enter appropriate instructions ordering the prosecution dismissed, pursuant to 28 USCA Sec. 2106.

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RESPECTFULLY SUBMITTED,

[redacted] and [redacted]

Attorneys for Appellant

[redacted]

CERTIFICATE OF SERVICE

I certify that on this 13th day of April, 1967 I mailed a true copy of the foregoing appellant's opening brief, to [redacted] Assistant United States Attorney for the Western District of Texas, El Paso Division, at his office in the Federal Courthouse Building, El Paso, Texas 79901.

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